

Gallatin County Transfer of Development Rights Program Guidebook

November 2006

Background-

This guidebook supplements Gallatin County's Transfer of Development Rights (TDR) Program, providing explanation and exhibits for ease of program administration. The guidebook starts with a general program summary, explanation of program administration, and exhibits as follows (*exhibits to be submitted at a later date*):

- Exhibit A- Application for Approval to Create and Convey TDRs.
- Exhibit B- Transfer of Development Rights Deed Restriction.
- Exhibit C- Deed of Transfer of Development Rights.
- Exhibit D- Application to Use TDRs at Receiving Site Development.
- Exhibit E- Deed of TDR Attachment.
- Exhibit F- Additional Examples of TDR Easement Affect.

The Gallatin County TDR Program is one method for rural landowners to receive compensation for voluntarily preserving their land. TDR works by redirecting potential development *away* from places deemed appropriate for preservation, called **sending areas**, and *toward* locations deemed appropriate for development, called **receiving areas**.

Gallatin County's TDR Program is part of the County's overall effort to manage growth and steer development to areas where residential development is preferred. The County's growth management efforts implement the Gallatin County Growth Policy. They comprise a variety of land use planning tools designed to provide landowners with options, including: **Open Space Land Program, Rural Cluster Program, and Transfer of Development Right Program.**

The TDR Program is voluntary. Rural landowners can choose not to use TDR. If TDRs are used, landowners can place a deed restriction on their land and receive transferable development rights, or TDRs, which can be sold to developers at a negotiated price. When TDRs are sold, a landowner foregoes the potential for future development on his/her land. Selling development rights from one's property does not mean, however, that a landowner cannot still use their land for residential (limited), ranching, recreation, or other compatible purpose. A landowner may of course choose to sell their property after TDRs are sold. Restrictions placed on the property as a result of extinguishing one's TDRs would run with the land.

Receiving areas are locations where continued residential growth is most desirable and suitable. Such areas include roads, schools, fire, police, water, sewer and other services that support residential living. Gallatin County has traditionally discouraged residential growth where such services do not exist.

Residential growth removed from services is defined as “sprawl.” Sprawl can place unreasonable financial demands on a community, interfering with productive agricultural uses, wildlife habitat, and a recreation-based economy. In short, sprawl can compromise the very attributes that have contributed to Gallatin County’s success. Combating sprawl and directing growth to suitable locations is one of the primary rationales behind Gallatin County’s TDR Program.

TDR programs are prevalent throughout the United States, the most successful perhaps being found in Montgomery County, Maryland. TDR is not new to Gallatin County. Programs currently exist in five of its citizen-initiated zoning districts: Bear Canyon, Bridger Canyon, Middle Cottonwood, South Gallatin, and Springhill. Reese Creek Zoning District has expressed interest in participating in an *intra-district* TDR program, which would allow the transfer of development rights to locations located *outside* the zoning district. Saddle Peak Ranch development in Middle Cottonwood Zoning District provides a local example of a successful use of TDR.

Indeed, a TDR program is inherently complicated – deed restrictions, allocation rates, sending and receiving areas, zoning and subdivision review, market-based approaches, etc. The Commission and staff have determined that the ideal TDR program should consist of the simplest and most streamlined procedures possible.

While the County is regulating *density* of unzoned land through subdivision review (see Subdivision Regulations), statutory zoning under Title 76, Title 2, Chpt. 2, MCA (County Zoning) is the preferred authority for a TDR program. The County’s TDR Program operates through a union of regulatory procedures found in the Subdivision Regulations and within *receiving area* zoning regulations.

The following pages include further explanation of how the TDR Program works. Those requiring detailed information are encouraged to speak with Gallatin County’s TDR Manager or the Gallatin County Planning Department.

Program Components-

A successful TDR program is dependent on a number of factors. One concerns basic supply and demand. A program will not work if demand for development doesn't exist, or if supply is either inadequate or exceeds demand. If supply is too low, TDRs may be too expensive for developers to purchase or may lead to inflated housing costs. If supply is too great, TDRs may become relatively worthless, negatively impacting those who have TDRs to sell. Gallatin County's TDR Program has been designed to balance as much as possible the number of available TDRs with potential demand for TDRs. Although the County serves an important role in establishing the supply and demand of TDRs, success is highly dependent on the private sector.

Because the program seeks to compensate rural landowners for leaving their land undeveloped, the program depends on a willingness of both rural landowners and developers to sell and buy TDRs. The program fails if rural landowners are not motivated to receive compensation for keeping their land undeveloped, and it fails if developers are not interested in developing at higher densities. Money and motivation are key.

Two important components are the **rural landowner** and the **developer**. A successful TDR program is set up to benefit both. The rural landowner wins because he/she receives compensation for leaving land undeveloped while maintaining continued ownership of such land. The developer benefits because he/she can develop property at a higher density, potentially reaping higher profits. The public and natural landscape comprise added potential beneficiaries, through protection of features such as riparian corridors, wildlife habitat, or prime agricultural lands.

Rural Landowners – Rural landowners provide the potential sending sites (transferred development rights) for a TDR program. In unzoned portions of Gallatin County, any property 20 acres or greater can qualify as a sending site. Sending sites are those areas of the County outside designated growth areas, and in most cases, outside of one of the County's zoning districts. Sending-site landowners can place deed restrictions on some or all of their property in order to accommodate a transfer of development rights to a receiving (or growth) area. The TDR allocation rates for sending and receiving areas are specified in Gallatin County's participating zoning district regulations.

Gallatin County's TDR Program offers landowners two different options for calculating the number of TDRs available for transfer: an **acreage-based calculation** in which the number of TDRs is assigned according to number of acres owned, or a **value-based calculation** in which TDRs are determined based on land value.

Under the acreage-based option, landowners receive a *pre-determined* number of TDRs per acreage. (For instance a program could establish an allocation of one TDR (or development right) per 20 acres.) A landowner could potentially increase his/her overall TDRs through a property appraisal establishing the number of sellable TDRs by dividing a pre-determined average value with the appraised value of the subject property. (Under this method a landowner may increase the number of TDRs to *multiple* development rights per 20 acres.)

Receiving Area Developers – As previously stated, receiving areas are those areas that make most sense for development. Gallatin County’s potential receiving (or growth) areas generally include land around the municipalities of Belgrade, Bozeman, Manhattan, and Three Forks (referred to as “donuts”). Additional receiving areas include Four Corners, Gallatin Gateway, and Churchill/Amsterdam. Because receiving areas must be zoned to participate in the County’s TDR Program, official receiving areas are currently limited to the Bozeman Donut. It is the County’s intention to expand the number of receiving areas by zoning designated growth areas. As has historically been the case in Gallatin County, citizen initiation is encouraged and supported in the creation of new zoning districts.

When developers choose to *exceed* baseline density in receiving areas, they must buy TDRs to increase density. The Program is set up to increase the density potential of a TDR as the average density of a development increases. For instance, a developer may get to build three residences with one TDR if he/she develops quarter-acre lots, as opposed to one-acre lots. It is the intent of the program to provide incentives (or bonuses) for smaller, more compact lots.

Further Information for Rural Landowners

As described above, the TDR Program is one way for rural landowners to receive compensation for voluntarily preserving their land. Before deciding on TDR, rural landowners should compare its advantages and disadvantages with those provided by the County's Rural Cluster Development Option, the Gallatin County Open Lands Program, large-lot subdivision, family transfers and the alternative of donating a conservation easement to a land trust.

What Land Qualifies As a Sending Area?

Property established through a zoning regulation can qualify as a sending site if it is located *outside* a receiving area and *outside* a zoning district (unless that zoning district has been approved as a sending area). Some of the County's recently adopted zoning districts have expressed an interest in participating as a sending area. (Reese Creek Zoning Regulation includes sending area language and Bozeman Pass Zoning District has language supporting the concept in the Bozeman Pass Plan.) In the future, additional zoning districts could become sending areas with citizen support and County Commission approval. But for now, the TDR sending areas are those areas outside the Bozeman, Belgrade and Manhattan donuts that are subject to the maximum average density of one lot per 160 acres adopted as part of the 2007 amendments to the Subdivision Regulations.

What Do the Deed Restrictions Restrict?

As previously noted, rural landowners can choose to participate or not participate in the TDR option. When landowners decide not to use TDR, they are subject to whatever regulations otherwise control the use and development of their land. Even when landowners chose the TDR option, they can decide whether to record a deed restriction that affects some or all of the total number of acres in their parcel. Landowners can also decide to record successive deed restrictions in order to allow the transfer of some TDRs at one time and additional TDRs at a later time.

The deed restrictions in this program provide great flexibility to landowners. These deed restrictions do not control land use or development other than the number of lots that can be created. These deed restrictions only document the number of acres deducted from the size of the original parcel when calculating the number of additional lots allowed under the maximum density limits established in the Subdivision Regulations. If the deed restriction affects only a portion of the number of acres in the parcel, the deed restriction only documents the number of acres removed from the calculation. The deed restrictions are not concerned with and do not identify the location of the affected number of acres. Instead, these deed restrictions document solely the number of acres affected.

Under a TDR easement, the landowner retains ownership and maintains the right to use the parcel in compliance with County regulations. This includes the right to build or retain a dwelling unit on this parcel assuming no other regulations would preclude the building of a dwelling unit.

How Many TDRs Can Be Created? (Acreage- Based Option)

Rural landowners can choose between two optional methods of determining the number TDR created by recordation of a TDR deed restriction. This section examines the option of an **acreage-based calculation**. When landowners select this option, one TDR is granted per a designated acres (for instance 20 acres) of a sending area parcel placed under deed restriction. As mentioned above, this deed restriction documents the number of acres that cannot be included when calculating the number of lots allowed by the maximum density regulations of the Subdivision Regulations. This can be expressed as the following formula: the number of total lots allowed on the sending parcel is the total acreage minus the acreage affected by the TDR deed restriction multiplied by the maximum allowed density. If the result of this multiplication is a product less than two, the parcel cannot be subdivided any further. Two examples of the effect of TDR Deed Restrictions are found below and three more examples are included as Exhibit F.

Example 1 – Assume the owner of a 640-acre sending area parcel decides to record a deed restriction on 160 acres, creating eight TDRs ($160 \div 20 = 8$). The remaining 480 acres would allow a total of three parcels at the current maximum density limit of one lot per 160 acres ($640 - 160 = 480 \times 1/160 = 3$). If maximum density is subsequently changed to one lot per 80 acres, the 160 acres under deed restriction must still be removed from the calculation of maximum density. At a maximum density of one lot per 80 acres, the remaining 480 acres would yield a total of six lots ($640 - 160 = 480 \times 1/80 = 6$).

Example 2 – Assume the owner of a 640-acre parcel deed restricts 480 acres of land creating 24 TDRs ($480 \div 20 = 24$). If the maximum density is subsequently changed to one lot per 120 acres, the parcel cannot be subdivided because the product of this calculation is less than two ($640 - 480 = 160 \times 1/120 = 1.33$). However, if the maximum density changed to one lot per 80 acres, two lots would be allowed ($640 - 480 = 160 \times 1/80 = 2$).

How Many TDRs Can Be Created? (Value - Based Option)

The **acreage-based allocation** discussed above offers a simple, fast and predictable way of determining the TDRs available to a sending site. However, the acreage-based option allocates the same number of TDRs per acre regardless of real differences in sending site development value. In an effort to make the TDR option attractive to all rural landowners, the regulation allows sending site applicants to choose an alternative allocation option in which the number of TDRs available to a property reflects the development value of that property.

To investigate this option, a landowner would first decide whether some or all of the acres in the sending site would be affected by a deed restriction. As with the Acreage-Based Option, the deed restriction only documents the number of acres deducted from the gross acres in the sending site when calculating the maximum number of lots permissible under the maximum density limits of the Subdivision Regulations. Since these deed restrictions are identical to those discussed above in connection with the acreage-based allocation, examples of the effect for these deed restrictions on sending parcels are not repeated in this section.

In the first step of using the **Value-Based Approach** to TDR allocation, an appraiser or real estate expert hired by the County prepares an estimate of the value of a deed restriction. The value estimate will not duplicate any value reduction that may have resulted from a pre-existing easement or other deed restriction recorded on the sending area property. Although this estimate uses appraisal techniques, it is not an appraisal and is intended to be used exclusively for TDR allocation purposes. In the year 2007, one TDR is granted for each full \$20,000 of estimated deed restriction value. (This divisor will be adjusted annually per the Consumer Price Index.) Bear in mind that this divisor is not intended to determine TDR sales prices. The price of TDRs is established by negotiation between buyers and sellers.

Example – Assume that the owner of a 640-acre sending area parcel decides to record a deed restriction that excludes 160 acres of the property from inclusion in a calculation of allowable lots. The deed restriction value estimate concludes that the recordation of this easement would reduce the value of the property by \$320,000. This estimated change in value is divided by the 2007 divisor amount of \$20,000 resulting in an allocation of 16 TDRs upon the recordation of this deed restriction ($\$320,000 \div \$20,000 = 16$). Thereafter, the deed restriction would permanently deduct 160 acres from the total number of acres for the purpose of determining the number of lots that can be created on site under the maximum density limitations of the Subdivision Regulations. The landowner can now sell the 16 TDRs at whatever price a developer is willing to pay. In addition, the landowner continues to own the land and use it in compliance with applicable regulations.

Further Information for Developers

In general, a TDR receiving area is a place where the County allows development to exceed baseline density when developers comply with all applicable regulations including TDR requirements. This section explains that most receiving areas are regulated by the Subdivision Regulations. However, within the Bozeman donut receiving area, provisions for developers to use TDRs are found in the Gallatin County/Bozeman Area (GC/BA) Zoning Regulations.

How Does the TDR Work within the Bozeman Donut?

The Gallatin County/Bozeman Area (GC/BA) Zoning Regulation (or Bozeman Donut), controls the TDR program as well as all other land use/development issues within the District. The TDRs used to allow increased density within the District are transferred into the District from land outside the District.

The receiving areas within the Donut are lands designated as Moderate-Intensity Development on the GC/BA Future Land Use Map and within any of three GC/BA zoning sub-districts: AS (Agricultural Suburban), R-S (Residential Suburban) and R-O (Residential Office). Different TDR requirements apply depending on the density category of the proposed development. The TDR requirements in each of the density categories apply to all lots or units in excess of the underlying base density, based on the overall density of the proposed project.

How TDRs could be used within future zoned receiving areas?

In addition to the Bozeman Donut, there are a variety of opportunities to create additional receiving areas in Gallatin County. Examples include the current donut jurisdictions of Belgrade, Manhattan and Three Forks; or growth areas designated in the Growth Policy such as Four Corners, Gallatin Gateway and Churchill/Amsterdam. Before participating as a receiving area, such areas must go through the planning process, including creation and adoption of neighborhood planning and zoning.

What About Areas Included in Future Zoning Districts?

The Subdivision Regulations state that TDR requirements also apply when land is subsequently included in a zoning district or approved through any other mechanism for a density that is greater than the maximum densities established by the Subdivision Regulations. If the Subdivision Regulations currently limit the receiving area to a maximum density of one lot per 20 acres, then one lot per 20 acres is also the baseline density for the purpose of determining TDR requirements. Similarly If the Subdivision Regulations currently limit the receiving areas to a maximum density of one lot per 160 acres, then one lot per 160 acres is also the baseline density for the purpose of determining TDR requirements.

Example - Assume a 160-acre area is currently limited by the Subdivision Regulations at one lot per 160 acres and the County subsequently adopts a zoning district allowing a maximum density of one unit per acre. Under the new zoning district, baseline density would be one lot per 160 acres and all units in excess of that density would be considered bonus units. If a developer proposes a 160-lot subdivision for this site, one lot would be within baseline density and 159 lots would be considered bonus lots. The proposed subdivision falls within the average density category in which one TDR is required for each bonus lot. Consequently, the development would require 159 TDRs.

Frequently Asked Questions

Can TDRs Be Granted to Land Restricted By Prior Easements?

TDRs cannot be granted to land already precluded from land divisions by pre-existing easements or deed restrictions. However, a preexisting easement or deed restriction that does not affect the ability to subdivide land would not preclude the recordation of a TDR Deed Restriction and the resulting creation of TDRs.

Can the Deed Restrictions Be Removed?

No. Once recorded, the deed restrictions are permanent. If the County changes the maximum density limitations in the future, these deed restrictions continue to limit the acreage that cannot be included when calculating the total number of lots allowed.

Does a TDR Deed Restriction Affect the Use or Development of the Affected Land Other Than Determining Allowable Land Divisions?

No. The TDR deed restriction does not control or limit the use or development of the affected acreage except for the purpose of determining the number of lots that a land division can create from a sending area parcel. A TDR Deed Restriction only reduces the size of a parcel for the sole purpose of calculating allowable subdivision of that parcel. The affected acreage is incorporated into the allowed lot or lots and can be used like any other portion of the sending site subject to compliance with all applicable codes.

Does a TDR Deed Restriction Identify Which Portion of a Sending Site Parcel Is Affected?

No. A TDR deed restriction is only used to calculate the allowable number of lots that can be created from a parcel. If a deed restriction affects only some of the acreage in a parcel, the location of that acreage is immaterial to the goal of the TDR Deed Restriction.

Must TDRs Be Sold Exclusively to Developers?

No. TDRs may be sold, purchased, transferred, held and received by any person or entity including the County, other governmental agencies and land preservation organizations.

At What Point Must Developers Satisfy TDR Requirements?

The timing of TDR compliance varies depending on whether or not the project requires a subdivision map and whether or not the developer proposes a multiple-phase project.

- When a final subdivision map would create an entitlement to exceed baseline density in a TDR receiving area, submission of the required number of TDRs must be a condition of approval placed on the tentative map. This condition must be satisfied prior to final map approval.

- When the approval of a development in excess of baseline density does not require a subdivision map, the County grants conditional approval of the project using the most appropriate approval document. This conditional approval states that the developer must comply with the TDR requirements applicable to all bonus density before final project approval can be granted.
- At its discretion, the Commission may allow the owners of multiple-phase developments to satisfy their TDR requirements as each phase is opened if assurances of payment satisfactory to the County Attorney's Office are executed prior to final map approval.

TDR Manager Responsibilities

As stated in the TDR provisions of the Subdivision Regulations, the TDR program is administered by a County staff member known as the TDR Manager. Some of the responsibilities of the TDR Manager are discussed in the sections above regarding the procedures for the sending and receiving areas. In addition, the TDR Manager is responsible for updating the Administrative Procedures, making recommendations on TDR-related entries to the County fee resolution, maintaining the TDR Registry, posting a TDR Clearinghouse and preparing an Annual TDR Report to the Commission.

Administrative Procedures

Administrative Procedures were adopted concurrently with adoption of the TDR provisions in the Subdivision Regulations. These Administrative Procedures were intended to foresee as many issues as possible. But as the TDR program is implemented, the TDR Manager will identify the need for changes, details and clarifications. The TDR Manager will prepare amendments to the Administrative Procedures and present to the Commission for approval on an as needed basis.

Fee Resolution

The TDR Manager will recommend TDR related application fees according to the County's typical practice for updating its application fees. There are four TDR-related application fees.

- Application for Approval to Create and Convey TDRs: Acreage-Based Allocation Method
- Application for Approval to Create and Convey TDRs: Value-Based Allocation Method
- Fee for Administrative Costs of Processing a Second Value Estimate under the Value-Based Allocation Method
- Application to Use TDRs at Receiving Site Development

TDR Registry

The TDR Registry is a documentation system designed to track TDRs from the time they are created to the time they are permanently affixed to a receiving site. The Registry is posted on the County web site to maximize opportunity for public review. Some communities have found that the Registry system is an effective way of reducing the possibility that TDRs are mistakenly used more than once. The TDR Manager can duplicate any of the TDR registries already in existence or design a registry to fit Gallatin County. The TDR Manager may consider but is not required to design a Registry in which each TDR is individually listed by serial number followed by the sending parcel, intermediate owners (if any) and the receiving site project to which the TDR was affixed (if that has occurred.) For each TDR, the location of the corresponding recorded documents could also be listed including the TDR Deed Restriction, the TDR Deed(s) of Transfer and the Deed of Attachment.

TDR Clearinghouse

A TDR Clearinghouse is simply a notification system in which sending area landowners state an interest in selling TDRs and receiving area developers state an interest in buying TDRs along with contact information so that these private parties can call or write each other as the possible start of negotiations. This information is available in hard copy and is also posted on the County web site for easy access. In designing the Clearinghouse, the TDR Manager should inspect existing clearinghouse systems developed by other communities.

TDR Annual Report

In many communities, the staff member responsible for the TDR program prepares an annual report providing information on transfer activity over the preceding year as well as cumulative TDR activity. This Annual Report might be as brief as one page. Alternatively, the Annual Report occasionally could also be an opportunity for the TDR Manager to point out program shortcomings and make recommendations for solutions.